Supreme Court, U.S.
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No. 98-0504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998.

VICTOR TORRES, ET AL.,
Petitioners,

v.

COMMISSIONER OF CORRECTION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement Of The Case.

I. PROCEEDINGS BELOW.

Eleven inmates challenged their confinement in the Department Disciplinary Unit ("DDU"), which opened in 1992, at the Massachusetts Correctional Institute at Cedar Junction, a state prison accredited by the National Commission on Correctional Health Care in 1994. App. to Cert. Petn., pp. A19, A25. They asserted claims under the Eighth Amendment's cruel and unusual punishment clause as well as claims under other federal and state constitutional provisions and state statutes.

The petitioners filed an interlocutory appeal[1] from the trial court's decision (reproduced at App. to Cert. Petn., pp. A13-A79) granting *partial* summary judgment to the respondents (collectively, the Massachusetts Department of Correction) on the claims for *systemic* relief. See App. to Cert. Petn., pp. A15

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[1]The trial court allowed the petitioners' motion for entry of separate and final judgment under Mass. R. Civ. P. 54(b), which allowed them to take an immediate appeal without waiting for entry of a final judgment after trial. App. to Cert. Petn., pp. A84-A86. The trial court's Rule 54(b) order expressly reserved the petitioners' right to proceed on their individual claims before the trial court. Id. at A86. The respondents did not appeal from the entry of partial summary judgment against them on the statutory duty of another state agency, the Department of Mental Health, to supervise periodic medical and psychiatric examinations in the DDU. See App. to Cert. Petn., pp. A29-A34.

("systemic challenge"), A75 ("systemic violations"). The Massachusetts Supreme Judicial Court ("SJC") affirmed the trial court's decision denying systemic relief. The SJC's decision rested on the objective component established by this Court's Eighth Amendment cases, as it concluded that there is "no factual dispute over the conditions endured by DDU inmates." 427 Mass. at 614, 695 N.E.2d at 203, App. to Cert. Petn., p. A5. The SJC accordingly did not address the petitioners' claim that there was a factual dispute on the subjective, or "deliberate indifference," component for the Eighth Amendment claims. 427 Mass. at 615 n.7, 695 N.E.2d at 204, n.7, App. to Cert. Petn., pp. A6-A7 n.7.[2]

The inmates immediately petitioned for certiorari, rather than proceeding to a trial on the merits of their remaining federal and state law claims. With respect to the Eighth Amendment claims in particular, the state trial court had expressly excluded the inmates' "individual claims" from its partial summary judgment on their challenge to the conditions of their confinement in the DDU. App. to Cert. Petn., pp. A38, A46, A75, A76-A78, A86.[3] The individual claims were not resolved by the SJC's decision on the interlocutory appeal and are still pending before the trial court.

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[2]This approach to Eighth Amendment conditions of confinement cases was approved in Helling v. McKinney, 509 U.S. 25, 35 (1993).

[3]The trial court also determined that "trial is necessary" on petitioners' inadequate food claim. App. to Cert. Petn., p. A41.

II. Related Lawsuit.

In its decision in this case, the SJC took notice of a lawsuit in which other inmates concurrently challenged their confinement in the DDU. 427 Mass. at 616 n.8, 695 N.E.2d at 204 n.8, App. to Cert. Petn., p. A7 n.8. In that case, another state trial court judge ruled, after an eight-day trial on the merits and a view of the DDU,[4] that there was no Eighth Amendment violation. Dr. Stuart Grassian -- the same expert proffered by the petitioners here (Cert. Petn., pp. 6, 8, 9, 10, 19) testified at the trial in that case, but his conclusions on the effects of confinement in the DDU were rejected by the trial judge. Commonwealth v. James Clark, et al., 8 Mass. L. Rptr. 97, 102 (April 6, 1998) (Norfolk Superior Court No. 97-4079).

III. Conditions At The DDU.

The following description of conditions in the DDU is extracted from the SJC's decision. 427 Mass. at 612-613, 695 N.E.2d at 202-203, App. to Cert Petn., pp. A2-A4.

The Department Discipline Unit (DDU) is a modern, secure facility that is used to house inmates who, after a hearing, are found to have committed serious disciplinary infractions while incarcerated. Each inmate is housed alone in an eighty-four

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[4]The trial judge in this case also took an "extensive view" of the DDU before entering partial summary judgment. App. to Cert. Petn., p. A17.

square foot cell[5] which contains its own window as well as a toilet, sink, bed, and desk. After an initial period in the DDU without further infractions, inmates may also have a radio and television in their cells, make four one-half hour telephone calls per month and have four one-hour noncontact visits per month. From their cells, inmates have access to reading materials and the prison law library.

Inmates have five hours of outdoor exercise each week and leave their cells three times weekly to shower. They receive hourly visits from correction officers, daily visits from the DDU director and captain, and four daily visits from medical personnel. Religious and mental health staff make rounds in the DDU each week. Inmates may speak with each other while in their cells and in the exercise yard.

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[5]By way of comparison, this Court found there was no Eighth Amendment violation when inmates were double-bunked in sixty-three square foot cells. Rhodes v.Chapman, 452 U.S. 337, 341 (1981).

Reasons For Denying The Writ.

I. There Is No Conflict Of Decisions To Warrant Certiorari.

As the petitioners concede, this is the "first decision" on the constitutionality of control units at federal and state prisons. Cert. Petn., p. 19. Thus, there is no conflict of decisions justifying certiorari under Supreme Court Rule 10(b).

The petitioners seek to avoid this barrier by suggesting that there is a conflict with a decision by this Court and with several decisions by federal courts of appeals. However, the supposed conflict between the SJC's decision and Helling v. McKinney, 509 U.S. 25 (1993), disappears when one distinguishes between systemic (or facial) and individual (or as-applied) challenges to prison conditions under the Eighth Amendment to the United States Constitution. See Lewis v. Casey, 518 U.S. 343, 357, 360 (1996) (individual injury in prison library case does not support systemic relief); Canton v. Harris, 489 U.S. 378, 390-391 (1989) (municipal liability does not arise from an otherwise sound program that has occasionally been negligently administered).

The petitioners improperly compare the partial summary judgment limited to systemic claims entered in this case to the inmate's Eighth Amendment claim in Helling that his involuntary exposure to environmental tobacco smoke ("ETS") during his imprisonment caused personal health problems. 509 U.S. at 27-28. Helling presents an individual claim that is the progeny of the holding in Estelle v. Gamble, 429 U.S. 97 (1976), that an inmate

can sue under the Eighth Amendment for a prison official's "deliberate indifference" to his "serious medical needs." Id. at 104.

The SJC's decision is consistent with Helling because it allows the petitioners to proceed to a trial on the merits of their individual claims that they have sustained psychological injury as a result of their confinement in the DDU. See App. to Cert. Petn., pp. A38, A46, A75, A76-A78, A86. Nor does the SJC's decision preclude the petitioners from offering expert testimony at trial in connection with their individual claims. In other words, the petitioners can proceed to trial and can present testimony by Dr. Grassian without the need for intervention by this Court.

Likewise, the federal courts of appeals cases cited by the petitioners (Cert. Petn., pp. 11-13) as conflicting decisions under Supreme Court Rule 10 involve individual, rather than systemic, claims under the Eighth Amendment. Indeed, three of the decisions[6] involve second-hand smoke, or ETS, medical claims by individual prisoners that were at issue in Helling and two other decisions[7] present different individual medical claims that the

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[6]Jacobs v. Young, 1997 WL 809925 (6th Cir. 1997) (unpublished opinion); Oliver v. Deen, 77 F.3d 156 (7th Cir. 1996); Goldyn v. Moran, 1997 WL 545484 (9th Cir. 1997) (unpublished opinion) (ETS and vaginal virus from dirty underwear).

[7]Ferdik v. Gaspar, 1994 WL 127166 (9th Cir. 1994); (unpublished opinion) (respiratory injury and back condition); LaBounty v. Coughlin, 137 F.3d 68 (2d Cir. 1998) (exposure to asbestos and dirty drinking water).

court of appeals analyzed under Helling. Three other decisions[8] present "failure-to-protect" physical safety claims by prisoners that implicate the Eighth Amendment under this Court's decision in Farmer v. Brennan, 511 U.S. 825 (1994). In the Seventh Circuit's opinion that the petitioners cite with approval, the court remanded the prisoner's claims for reconsideration in light of the intervening decision in Farmer and expressly stated that the lower court could rule on summary judgment prior to a trial on the merits. Del Raine v. Williford, 32 F.3d 1024, 1038 (7th Cir. 1994) (complaint of cold cell due to broken windows). Thus, it is not in conflict with the SJC's affirmance of partial summary judgment in this case.[9]

Moreover, four of the decisions that the petitioners rely on are unpublished opinions, which local court rules say cannot be cited as authority (except for reasons that are not relevant here). See Fourth Circuit Local Rule 36(c), Sixth Circuit Rule 24(c), Ninth Circuit Rule 36-3. Decisions that cannot even be cited to the issuing court of appeals, or to the district courts in the circuit,

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[8]Hamilton v. Leavy, 117 F.3d 742 (3d Cir. 1997); Copeland v. Lanham, 1994 WL 64748 (4th Cir. 1994) (unpublished opinion); Jensen v. Clarke, 94 F.3d 1191 (8th Cir. 1996).

[9]In addition, decisions by federal courts of appeals on whether lower federal courts properly applied the federal summary judgment rule are quite different from suggesting, as the petitioners do, that the same standards apply to state court use of a state summary judgment rule, which presents a question of state law that is not reviewable by this Court. See footnote 10 infra.

should not be the basis for establishing a conflict of decisions under Supreme Court Rule 10(b).

Finally, the petitioners' reliance on Helling as authority requiring the SJC to reverse the state trial court's grant of partial summary judgment is misplaced. While it is true that the Helling opinion appears to contemplate that the prisoner will use scientific opinion on remand in order to prove that involuntary exposure to ETS is the cause of his health problems, 509 U.S. at 27-28, 35, Helling also warns that the objective component of an Eighth Amendment claim "requires more than a scientific and statistical inquiry." Id. at 36. What is required is for a "*court* to assess whether society considers the risk . . . so grave that society considers that it violates contemporary standards of decency." Id. (emphasis added). In this case the SJC did just that: it determined that the undisputed conditions at the DDU did not violate contemporary standards of decency. Nevertheless, the petitioners still have an opportunity to prove at trial that, as applied to individual inmates, the conditions might violate the Eighth Amendment. Both Helling and the SJC's decision are consistent with Rhodes v. Chapman, 452 U.S. 337, 348 n.13 (1981) (lower courts "erred in assuming that opinion of experts as to desirable prison conditions suffice to establish contemporary standards of decency") and Bell v. Wolfish, 441 U.S. 520, 543-544 n.27 (1979) (expert opinions "simply do not establish the constitutional minima").

II. THE CASE LACKS NATIONAL IMPORTANCE BECAUSE THE PETITIONERS POSE A PROCEDURAL OBJECTION TO A DECISION THAT IS NOT FINAL AND BECAUSE EIGHTH AMENDMENT RIGHTS ARE WELL ESTABLISHED.

The relief that the petitioners seek is limited. They ask this Court to hold that the Massachusetts courts erred when they decided there was no genuine issue of material fact that barred entry of partial summary judgment on some claims in the case under the Massachusetts Rules of Civil Procedure. On this basis they ask that this Court remand the case to the Massachusetts courts for a "right to a trial" at which their expert, Dr. Stuart Grassian, can testify. Cert. Petn., pp. 3, 6, 8.[10] As already noted, however, the SJC's decision does not bar the petitioners from proceeding to trial on their individual claims under the Eighth Amendment. Viewed in context, the case fails the "important question of federal law" test under Supreme Court Rule 10(c).

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[10]In their interlocutory appeal the petitioners asked that the SJC rule that the state trial court erred when it found that there was "no genuine issue as to any material fact" under Mass. R. Civ. P. 56(c) and that it was therefor improper to rule on eight of the thirteen counts in the complaint under the state summary judgment procedure. The SJC held that the trial court acted correctly under Mass. R.Civ. P. 56(c). 427 Mass. at 613-614, 695 N.E.2d at 203, App. to Cert. Petn., pp. A4-A5. The petitioners' procedural objection is a matter of state law that this Court lacks jurisdiction to review. Fox Film Corp., v. Muller, 296 U.S. 207, 211 (1935) (state contract law); Caldwell v. Mississippi, 472 U.S. 320, 327 (1985) (state procedural rule).

The case also lacks national importance because this Court has addressed the elements of Eighth Amendment claims in a number of recent decisions. E.g., Wilson v. Seiter, 501 U.S. 294 (1991); Helling v. McKinney, 509 U.S. 25 (1993); Farmer v. Brennan, 511 U.S. 825 (1994). The SJC's decision applies this Court's tests, starting with the "objective component of an Eighth Amendment prison claim (Was the deprivation sufficiently serious?)." Seiter, 501 U.S. at 298.[11] Recognizing that there was "no factual dispute over the conditions endured by the DDU inmates," the SJC determined that there was no systemic violation of Eighth Amendment standards. 427 Mass. at 614, 695 N.E.2d at 203, App. to Cert. Petn., p. A5. The petitioners agree with the SJC that there is "no significant dispute about the actual physical conditions of confinement in the DDU." Cert. Petn., p. 6.

The certiorari petition also overlooks the deference owed the "legislative and executive branches of government," especially "[w]here a state penal system is involved," given the "complex and intractable" problems of running a prison. Turner v. Safley, 482 U.S. 78, 84, 85 (1987). See also Procunier v. Martinez, 416 U.S. 396, 404 (1974) ("hands-off attitude toward problems of prison administration"). Particularly pertinent to this case is the fact that, as the trial court found, each of the petitioners was "assigned to the DDU after being found guilty of committing a major disciplinary violation while incarcerated," including

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[11]The SJC 's decision quoted the formulation of the objective component from Farmer, 511 U.S. at 834 (whether the "conditions of confinement present 'a substantial risk of serious harm'"). 427 Mass. at 613-614, 695 N.E.2d at 203, App. to Cert. Petn., p. A4.

"stabbing another inmate" as well as "attempting to attack another inmate" in the DDU. App. to Cert. Petn., p. A14. Responsibility for the safety of other inmates is a constitutional obligation of state prison officials under this Court's Eighth Amendment "failure-to-protect" cases. E.g., Farmer, 511 U.S. at 828, 832, 849; Hudson v. Palmer, 468 U.S. 517, 526-527 (1984) ("take reasonable measures to guarantee the safety of the inmates"). It would be untoward to intrude into the delicate balance between the secure confinement of the petitioners in the DDU and the personal safety of other inmates before the state court litigation has ended. See Rhodes v. Chapman, 452 U.S. at 339 ("Constitution does not mandate comfortable prisons") id. at 349 n.14 ("prison's internal security is peculiarly a matter normally left to the discretion of prison administrators"); Farmer, 511 U.S. at 830 (transsexual prisoner placed in segregation due to "safety concerns").

III. This Court Lacks Jurisdiction Because The State Court Proceedings Are Not Yet Complete.

This Court has jurisdiction to review only "final judgments" by state courts. 28 U.S.C. § 1257. Even though Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479-485 (1975), illustrates that the finality rule is sometimes a permeable barrier, at the very least it counsels hesitation in granting certiorari before the state court proceedings are complete.[12] This is especially true

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[12]The respondents' view is that none of Cox Broadcasting's exceptions to the final judgment rule apply to this case. The respondents agree, however, that there will be no further state

in the context of an Eighth Amendment prison conditions case where the Court has said that it must "proceed cautiously." Rhodes v. Chapman, 452 U.S. at 351.

Adherence to the finality rule is peculiarly appropriate in this case where, as noted earlier, there will be further state court proceedings on the petitioners' individual Eighth Amendment challenges to their confinement in the DDU -- the same constitutional provision on which they seek certiorari. Indeed, it appears that the petitioners can still present at trial the exact claims that they highlight on pages 6-7 of their petition as warranting certiorari. And if the petitioners were to sustain their burden of proof at trial, the respondents might still prevail on the subjective, or culpable state of mind, component of the Eighth Amendment claim. Seiter, 501 U.S. at 299-301. The future state court proceedings might, therefor, either reframe the constitutional question, obviate the need for review of the constitutional question, or avoid the possibility of a second request for review by this Court.

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court proceedings on the *systemic* claims that the petitoners presented to the SJC on their interlocutory appeal, due to the operation of Mass. R. Civ. P. 54(b).

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari to the Massachusetts Supreme Judicial Court should be denied.

Respectfully submitted,

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ADDENDUM

U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Mass. R. Civ. P. 54(b)

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Mass. R. Civ. P. 56(c)

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.